

To the Honorable Council City of Norfolk, Virginia

August 25, 2015

From:

David S. Freeman, AICP

Director of General Services

Subject: Encroachment Agreement for the locating and enclosing of a

generator at 324 Madison Mews

Reviewed:

Ward/Superward: 2/6

Approved:

Marcus D. Jones, City Manager

Item Number:

R-17

Recommendation: Adopt Ordinance ١.

11. Applicant: T-Mobile Northeast, LLC

Building Owner: Partners in Dance, LLC.

III. Description:

This agenda item is a new encroachment agreement between The City of Norfolk ("City") and T- Mobile Northeast, LLC ("T-Mobile") which will grant T-Mobile permission to encroach into the right of way of Madison Mews at 324 Madison Mews for the purpose of locating and enclosing a generator.

IV. **Analysis**

The Encroachment Agreement will permit T-Mobile to locate and enclose the generator, utilize the space for storage use, maintenance, repair, as well as the removal or replacement of the generator in conjunction with the operation of wireless services and T-Mobile's business. The encroachment area is approximately 156 square feet. The term of the encroachment commences on September 1, 2015 and terminates on August 31, 2020. It is subject to council revocation and the City is named as additional insured.

Financial Impact ٧.

T-Mobile Northeast, LLC will pay the city rent at the rate of \$6.00 per square foot of the encroachment area for the five year term. The total square feet of the encroachment area is 156 which constitutes annual rent in the amount of \$936.00

VI. Environmental

There are no known environmental issues associated with this property.

VII. Community Outreach/Notification

Public notification for this agenda item was conducted through the City of Norfolk's agenda notification process.

VIII. Board/Commission Action

The outdoor dining request was approved by the Design Review Committee.

IX. Coordination/Outreach

This letter and ordinance have been coordinated with the Department of General Services – Office of Real Estate and the City Attorney's Office.

Supporting Material from the City Attorney's Office:

- Ordinance
- Encroachment Agreement

7/23/2015

Form and Correctness Approved:

Office of the City Attorney

By ___ DEPT.

Contents Approved

NORFOLK, VIRGINIA

ORDINANCE No.

AN ORDINANCE APPROVING AN ENCROACHMENT AGREEMENT WITH T-MOBILE NORTHEAST LLC FOR PROPERTY AT 324 MADISON MEWS.

BE IT ORDAINED by the Council of the City of Norfolk:

Section 1:- That the terms and provisions of the Encroachment Agreement between the City of Norfolk and T-Mobile Northeast LLC, a copy of which is attached hereto, by which the City of Norfolk authorizes T-Mobile Northeast LLC to encroach into the right of way of Madison Mews an area measuring no more than 9' by 17'4", approximately 156 square feet, upon certain conditions specifically set forth therein, is hereby approved.

Section 2:- That the City Manager of the City of Norfolk is authorized to execute said Encroachment Agreement, which shall be approved by the Office of the City Attorney, for and on behalf of the City.

Section 3:- That this ordinance shall be in effect from and after its adoption.

ENCROACHMENT AGREEMENT

	This	Encroachment	Agreement	(hereinafte	r "Agreem	ent") is	made	and
entered into th	nis	day of		_, 2015, by	and betw	een the	CITY	OF
NORFOLK,	a mur	nicipal corpora	tion of the	Commonwe	ealth of V	irginia ((hereina	ıfter
"City"), and T	-MOI	BILE NORTH	EAST LLC	C, a Delawar	e Limited	Liability	y Comp	any
(hereinafter "T	`-Mob	ile").						

WITNESSETH:

- 1. **ENCROACHMENT AREA**. City hereby grants permission to T-Mobile to encroach into the right of way of Madison Mews at 324 Madison Mews, an area measuring 9' by 17'4" (approximately 156 square feet), as shown on Exhibit A attached hereto, for the purpose of locating and enclosing a generator.
- 2. <u>USE</u>. T-Mobile shall be permitted to occupy the Encroachment Area throughout the term for access, storage use, operation, maintenance, repair, removal and replacement of a generator in conjunction with the operation of wireless services and T-Mobile's business. In carrying out and effecting this permitted use, T-Mobile agrees not to block the flow of traffic using Madison Mews. The City acknowledges that the generator exists as of the date of this Agreement and does not violate the foregoing.
- 3. <u>TERM; TERMINATION</u>. The term of the permission to encroach granted hereby shall be no longer than five (5) years and shall commence on September 1, 2015, or upon the effective date of any authorizing ordinance, whichever shall last occur, and shall terminate on August 31, 2020. However, it is expressly understood that the permission granted hereby is expressly subject to the right of revocation by the City Council, and that in the event of such revocation, T-Mobile, or its successors or assigns,

if requested by City, shall remove the encroaching structures and shall cease using the Encroachment Area for storage of a generator.

The City and T-Mobile hereto understand that T-Mobile 's generator is to be used in connection with the use of the premises known as 324-330 Madison Mews, in Norfolk, VA, under a lease between Partners in Dance, LLC, and T-Mobile, as Tenant. The City will consider entering into a new Agreement with T-Mobile for the encroachment area, from time to time after the expiration of this Agreement.

- 4. <u>COMPENSATION</u>. As compensation for the privilege of encroaching into the right of way, T-Mobile will pay City at the address designated in this paragraph below, annual rent of Nine Hundred Thirty-Six Dollars (\$936.00) to be paid on the first day of September, 2015 or the day the ordinance is effective whichever is later and yearly thereafter on September 1 of each year during the term. The compensation shall be paid by check made payable to the Norfolk City Treasurer and sent to the Manager of Real Estate, City of Norfolk, City Hall Building, 810 Union Street, Norfolk, Virginia 23510.
- 5. <u>LATE FEES</u>. For any late payments received after September 30th of each year, T-Mobile shall pay a late fee of five percent (5%) of the amount not paid when due.
- 6. <u>UTILITIES</u>. City shall not be responsible for utilities of any type used within the Encroachment Area. T-Mobile shall pay all utility meter and utility services charges for all utilities, including but not limited to gas, electricity, water, telephone, sewer, etc., necessary to serve the Encroachment Area.
- 7. **REPAIRS**. T-Mobile shall keep and maintain the Encroachment Area in good and complete state of repair and condition, except for ordinary wear and tear. T-

Mobile shall make all repairs and replacements of every kind to the sidewalks and paved areas of the Encroachment Area in order to preserve and maintain the condition of the Encroachment Area. All such repairs and maintenance shall be performed in a good and workmanlike manner, be at least equal in quality and usefulness to the original components, and not diminish the overall value of the Encroachment Area.

- 8. **REQUIREMENTS OF PUBLIC LAWS**. T-Mobile shall suffer no waste or injury to the Encroachment Area and shall comply with all federal, state and municipal laws, ordinances and regulations applicable to the structure, use and occupancy of the Encroachment Area by T-Mobile. In addition, T-Mobile shall effect the correction, prevention and abatement of nuisances, violations or other grievances in, upon or connected with the Encroachment Area.
- enter upon the Encroachment Area at any time for the purpose of inspecting the Encroachment Area, ascertaining compliance with this Agreement, and if T-Mobile fails to cure the same within ten (10) days after written notice from the City specifying such failure, and making any repairs which City deems necessary as a consequence of any failure of T-Mobile to meet its obligations under this Agreement. The actual reasonable and documented cost of any such repairs shall be deemed additional compensation payable by T-Mobile within thirty (30) days after receipt of an invoice therefore. Any entry upon the Encroachment Area or cure and repair shall be accomplished by City at reasonable times and in the exercise of reasonable discretion by the City. The making of any repairs by City shall not constitute a waiver by City of any right or remedy upon T-Mobile 's default in making repairs.

10. <u>NOTICE</u>. Any notice shall be in writing and shall be delivered by hand or sent by United States Registered or Certified Mail, postage prepaid, or by reliable overnight courier, addressed as follows:

To City:

Manager of Real Estate

City of Norfolk

City Hall

810 Union Street

Norfolk, Virginia 23510

With copy to:

City Attorney

810 Union Street

900 City Hall Building Norfolk, Virginia 23510

To T-Mobile:

T-Mobile Northeast LLC

c/o T-Mobile

12920 S.E. 38th Street

Bellevue, Washington 98006

Attn: National Lease Administration

with a mandatory copy to:

T-Mobile Northeast LLC

c/o T-Mobile

12920 S.E. 38th Street

Bellevue, Washington 98006

Attn: General Counsel

Either party hereto may change its address to which said notice shall be delivered or mailed by giving notice of such change as provided above. Notice shall be deemed given when delivered (if delivered by hand or by overnight courier) or within five (5) business days of postmark (if sent properly by mail).

11. **ENVIRONMENTAL MATTERS**. T-Mobile agrees that it will not introduce onto the Encroachment Area any toxic, hazardous or dangerous materials unless such material is stored, safeguarded, or used in accordance with applicable laws and regulations. T-Mobile will not allow any air, water or noise pollution to occur in the Encroachment Area. T-Mobile hereby agrees to use and occupy the Encroachment Area

in a safe and reasonable manner and in accordance with applicable law. T-Mobile warrants to the City the generator will only be used as an emergency generator and will not be the primary source of electricity to the premises at 324-330 Madison Mews. T-Mobile intends to use the emergency generator as follows: (a) by turning on the generator once a week for less than one (1) hour ("periodic testing"); (b) by disconnecting its premises from commercial power and running the generator once a month for less than one (1) hour ("load testing"); and (c) in case of the failure of commercial power to its premises, running the generator until commercial power is restored ("emergency use"). Such periodic testing, load testing and emergency use shall not be deemed noise pollution nor a violation of any other restriction or prohibition under this Agreement.

City in turn agrees that T-Mobile shall not be responsible or assume liability for environmental conditions existing under, adjacent to, or about the Encroachment Area prior to T-Mobile's occupancy thereof under this Agreement.

- 12. <u>ATTORNEY'S FEES</u>. Should either party be entitled to collect compensation or damages or obtain any other remedy hereunder and be forced to do so through its attorney, or by other legal procedures, such party shall, upon receipt of a favorable ruling, be entitled to recover its reasonable costs and attorney's fees thereby incurred.
- be damaged or destroyed by fire, lightning, vandalism, or by any other casualty or cause, the permission granted hereby shall be automatically terminated unless the parties agree, in writing, within thirty (30) days after the date of such damage, to continue to permit the encroachments granted by City Council. The parties will work together diligently and in

good faith to reach an agreement on the foregoing promptly after the occurrence of the damage herein described.

- 14. **NON-LIABILITY OF CITY**. City shall not be liable for any damage or injury which may be sustained by T-Mobile or any other person as a consequence of the failure, breakage, leakage or obstruction of the water, plumbing, steam, gas, sewer, waste or spoil pipes, roof, drains, leaders, gutters, valleys, downspouts or the like, or of the electrical, ventilation, air conditioning, gas, power, conveyor, refrigeration, sprinkler, hearing or other systems, elevators or hoisting equipment, if any, upon the Encroachment Area, or by reason of the elements; or resulting from acts, conduct or omissions on the part of T-Mobile, or their agents, employees, guests, licensees, invitees, assignees or successors, or on the part of any other person or entity.
- 15. **REMOVAL OF SNOW**. T-Mobile agrees to remove or cause to be removed, as the need for the same arises, snow and ice from the Encroachment Area.
- obligations under Section 7 of this Agreement, T-Mobile covenants and agrees that it will not make any improvements, changes installations, renovations, additions or alterations in and about the Encroachment Area without the prior written consent of the City, which consent shall not be unreasonably withheld, conditioned or delayed. If T-Mobile installs or makes any improvements, additions, installations, renovations, changes on or to the Encroachment Area with the approval of City, T-Mobile hereby agrees to remove, if requested by City in writing, any improvements, additions, installations, renovations, changes on or to the Encroachment Area upon termination of this Agreement. In the event T-Mobile fails to remove and is requested to do so by City, as described herein,

then City may remove the improvements, additions, installations, renovations, changes and bill T-Mobile for the reasonable cost of such removal, but only if T-Mobile fails to perform the same within ten (10) business days after written notice from the City.

- 17. **ASSIGNMENT AND SUBLETTING**. City and T-Mobile agree that the permission to encroach granted hereby may not be assigned by T-Mobile without the written permission of Norfolk's City Manager, which permission shall not be unreasonably withheld, conditioned or delayed.
- the Encroachment Area to City and remove all goods and chattels and other personal property therefrom upon termination of the permission granted hereby. T-Mobile shall return the Encroachment Area to the City in as good order and condition as they were at the beginning of T-Mobile 's use of the Encroachment Area, reasonable wear and tear excepted. If T-Mobile fails to remove and has been requested to remove all items from the Encroachment Area upon termination hereof, City is authorized to remove and dispose of any such personal property and T-Mobile shall be liable to City for the reasonable cost of any removal and disposal.
- 19. **INSURANCE**. T-Mobile shall maintain in full force and effect a combined single limit policy of bodily injury, death and property damage insurance that coincides with the existing policy for T-Mobile, of one million dollars (\$1,000,000) per occurrence and two million dollars (\$2,000,000 aggregate insuring City and T-Mobile against all liability arising out of the use, occupancy, or maintenance of the Encroachment Area and appurtenant areas, which policy shall be endorsed as primary insurance in favor of City naming the City, its officers, employees, agents and

representatives as additional insured, as their interests may appear, as evidenced by a Certificate of Insurance provided to the City within thirty (30) days after execution of this Agreement. All insurance policies and certificates shall provide for thirty (30) days advance notice in writing to the Manager for Real Estate if the insurance is cancelled or modified so as to affect the City. T-Mobile believes and states that the insurance obligation herein does not exceed that which it would otherwise normally place upon itself and obtain in order to operate its business in a prudent manner.

20. **FIXTURES**. City covenants and agrees that no part of the improvement constructed, erected or placed by T-Mobile, in the Encroachment Area shall be or become, or be considered as being, affixed to or a part of the right of way, and any and all provisions and principles of law to the contrary notwithstanding, it being the specific intention of City and T-Mobile to covenant and agree that all improvements of every kind and nature constructed, erected or placed by T-Mobile in the Encroachment Area shall be and remain the property of T-Mobile.

21. ENVIRONMENTAL COMPLIANCE.

- (a) For purposes of this section:
- (i) "Hazardous Substances" include any pollutants, dangerous substances, toxic substances, hazardous wastes, hazardous materials or hazardous substances as defined in or pursuant to the Resource and Conservation Recovery Act (42 U.S.C. SS6901 et seq.) (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. SS9601 et seq.) (CERCLA) or any other federal, state, or local environmental law, ordinance, rule or regulation.
 - (ii) "Release" means releasing, spilling, leaking, pumping,

pouring, emitting, emptying, discharging, injection, escaping, leaching, disposing or dumping.

- "Notice" means any summons, citation, directive, order, (iii) claim, litigation, investigation, proceeding, judgment, letter or other communication, written or oral, actual or threatened, from any authority of the Commonwealth of Virginia, the United States Environmental Projection Agency (USEPA) or other federal, state or local agency or authority, or any other entity or any individual, concerning any intentional act or omission resulting or which may result in the Release of Hazardous Substances into the waters or onto the lands of the Commonwealth of Virginia, or into waters outside the jurisdiction of the Commonwealth of Virginia or into the "environment," as such terms are defined in CERCLA. "Notice" shall include the imposition of any lien on any real property, personal property or revenues of T-Mobile, including but not limited to T-Mobile's interest in the Encroachment Area or any of T-Mobile's property located thereon, or any violation of applicable federal, state or local environmental laws, ordinances, rules, regulations, governmental actions, orders or permits, or any knowledge, after due inquiry and investigation, or any facts which could give rise to any of the above.
- (b) To the extent that T-Mobile may be permitted under applicable law to use the Encroachment Area for the generating, manufacture, refining, transporting, treatment, storage, handling, disposal, transfer or processing of Hazardous Substances, solid wastes or other dangerous or toxic substances, T-Mobile shall insure that said use shall be conducted at all times strictly in accordance with applicable statutes, ordinances and governmental rules and regulations. T-Mobile shall not cause or permit, as a result of

any intentional or unintentional act or omission, a Release of Hazardous Substances in the Encroachment Area. If any such intentional or unintentional act or omission causes a Release of Hazardous Substance in the Encroachment Area, T-Mobile shall promptly clean up and remediate such Release in accordance with and to the extent required by the applicable federal, state and local regulations and to the reasonable satisfaction of City.

- (c) T-Mobile shall comply with all applicable federal, state and local environmental laws, ordinances, rules and regulations relating to T-Mobile's use and operations in the Encroachment Area, and shall obtain and comply with any and all permits required thereunder or any successor or new environmental laws. Upon the receipt of any Notice, T-Mobile shall notify City promptly in writing, detailing all relevant facts and circumstances relating to the Notice.
- (d) The requirements of this Section 21 shall apply to any successor in interest to T-Mobile, whether due to merger, sale of assets or other business combination or change of control.
- (e) T-Mobile hereby agrees to defend (with counsel reasonably satisfactory to City) and indemnify and hold City harmless from and against any and all claims, losses, liabilities, damages and expenses (including, without limitation, reasonable cleanup costs and reasonable attorney's fees arising under this indemnity) which may arise directly or indirectly from any use or Release of Hazardous Substances in the Encroachment Area and losses and claims against City resulting from T-Mobile 's failure to comply strictly with the provisions of this Section 21. The provisions of this Section 21 shall survive the termination of this permission granted by City Council.

- 22. <u>LIENS OR ENCUMBRANCES</u>. If because of any act or omission of T-Mobile, any mechanic's lien or other lien, charge or order for the payment of money shall be filed against any portion of the Encroachment Area, T-Mobile shall, at its own cost and expense, cause the same to be discharged of record or bonded within ninety (90) days after written notice from the City to T-Mobile of the filing thereof, and T-Mobile shall have the right to contest the validity of such lien if it so chooses.
- 23. APPLICABLE LAW. The permission granted by City Council shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia. Any suit or legal proceeding relating to permission granted hereby shall be brought only in the state or federal courts located in the Eastern District of Virginia. The City represents and warrants that prior to execution of this Agreement, the City has complied with all such necessary public process, designations, and other legal process and requirements necessary for the City to lawfully permit the encroachment by T-Mobile, and that the undersigned is duly authorized by the City Council to execute this Agreement.
- 24. WAIVER OF TRIAL BY JURY. City and T-Mobile mutually waive their rights to trial by jury in any action, proceeding or counterclaim brought by either party against the other with respect to any dispute or claim arising out of the permission to encroach granted to T-Mobile pursuant to this Agreement.
- which any term of this Agreement is in effect, T-Mobile does not and shall not knowingly employ any unauthorized alien. For purposes of this section, an "unauthorized alien" shall mean any alien who is neither lawfully admitted for permanent residence in the

United States nor authorized to be employed by either Title 8, section 1324a of the United States Code or the U.S. Attorney General.

IN WITNESS WHEREOF, the parties hereto have executed or have caused this Encroachment Agreement to be executed by their duly authorized officers, all as of the day and year first above written.

THE CITY OF NORFOLK

E	Ву:							
	City Manager							
ATTEST:								
City Clerk								
		Т-МО	BILE N	ORTHE	CAST LLC			
I	3v:							
		Name:						
CONTENTS APPROVED:	Print '	Title:						
Director, General Services								
FORM & CORRECTNESS APPROV	ED:							
Deputy City Attorney								

